82 - 1824

No.

In The
Supreme Court of The United States

October Term, 1982

ROBERT A. HIRSCHFELD, and
WILLIAM D. HIRSCHFELD,
Petitioners,

v.

RAYMOND F. DREYER,
ROBERT K. CLUNIE, and
NADINE M. CLUNIE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 18, 1983

No.

In The
Supreme Court of The United States

October Term, 1982

ROBERT A. HIRSCHFELD, and
WILLIAM D. HIRSCHFELD,
Petitioners,
v.
RAYMOND F. DREYER,
ROBERT K. CLUNIE, and
NADINE M. CLUNIE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 18, 1982, upon which rehearing was denied on January 20, 1983.

QUESTION PRESENTED

Does existence of a state-fixed, long-settled custodial status, as a necessary underlying fact in a federal diversity parental kidnapping tort action, absolutely deny to a United States District Court subject matter jurisdiction?

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The memorandum Opinion of the Court of Appeals (unpublished) and the Order of the District Court for the District of Arizona (unpublished) appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 18, 1982. A timely petition for rehearing *en banc* was denied on January 20, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1). Defendant parties other than named Respondents[1] Raymond F. Dreyer, Robert K. Clunie and Nadine M. Clunie in the lower court proceedings are herewith abandoned by Petitioners. Review is sought solely with respect to Respondents Raymond F. Dreyer, Robert K. Clunie and Nadine M. Clunie.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; -to Controversies to which the United States shall be a Party; -to Controversies between two or more States; -between a State and Citizens of another State; -between Citizens of different States; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Code, Title 28:

§1332, *Diversity of Citizenship.....*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between -

(1) citizens of different states....

STATEMENT OF THE CASE

In June, 1980, respondents Raymond F. Dreyer, Robert K. Clunie and Nadine M. Clunie conspired to remove sixteen-year-old Serisa Lynn Hirschfeld from the lawful custody of her father, petitioner Robert A. Hirschfeld, in violation of a long-settled and uncontested custody decree by which Robert Hirschfeld had continuously been sole custodian of his two children since 1975. Respondents transported Serisa from Arizona to California without her father's knowledge or consent, and concealed her whereabouts from him.

After their acts of parental kidnapping and custodial interference, respondents later attempted to legitimize their unlawful taking of the child, and sought to escape both civil and criminal liability by seeking in the "asylum" state of California an ex-parte custody modification to the former Mrs. Hirschfeld, respondent Nadine M. Clunie. The "cover-up", after-the-fact state action relied upon false and perjured allegations by respondents, and is the subject of a still pending appeal in the courts of California, the outcome of which is unrelated to petitioner's settled and unchallenged status as sole custodian at the time of respondent's initial tortious acts.

Based upon respondent's acts, in removing his daughter from his lawful custody in Arizona before the subsequent attempted custody modification, petitioner Robert Hirschfeld filed a diversity action in the U.S. District Court in Phoenix, Arizona, alleging child enticement, conspiracy to interfere with lawful custody, and the intentional infliction of severe emotional distress.

The gravamen of petitioner's complaint was a prayer for substantial compensatory and punitive damages. While the "cover-up" attempted California modification action was independently challenged in California courts, the federal complaint included ancillary prayer for injunctive relief in the nature of *habeus corpus*, for the physical return of Serisa to her father. Petitioner also sought to enjoin then-pending actions by three California judges who were named as defendants, but whose now-affirmed dismissal as parties for absolute judicial immunity is not challenged herein.[1]

Serisa Hirschfeld attained her majority during the federal appeal below; thus, the injunctive relief is now moot, is severable from the remaining tort action, and is not at issue herein. The federal diversity tort action did not seek any District Court adjustment or modification of state-fixed parent-child status.

The District Court dismissed the entire matter with respect to the three respondents herein, citing the Ninth Circuit's position that diversity subject matter jurisdiction is nonexistent in any federal action "*involving* child support or child custody." (emphasis added)

The Court of Appeals, in a Memorandum Opinion, affirmed the entirety of the District Court's dismissal. The Ninth Circuit panel was aware of successful diversity parental kidnapping tort cases in which subject matter jurisdiction had been assumed by courts in the Second, Fourth, Fifth, Seventh and D.C. Circuits. Despite the fact that several such cases had proceeded through trial, award of substantial damages and affirmance, the Ninth Circuit panel ruled:

"*In this circuit*, the federal courts *must* decline jurisdiction under the domestic relations exception '*when the primary issue concerns the status of parent and child or husband and wife.* (citations)' The domestic relations exception cannot be circumvented by pleading an independent tort." *See* p.1 of Appendix hereto.(emphasis added)

A petition for rehearing *en banc* was denied.

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n.1 The parties to the proceeding before the Ninth Circuit were Robert A. Hirschfeld and William D. Hirschfeld, Appellants, and Nadine M. Clunie, Robert K. Clunie, Raymond F. Dreyer, the Hon. Charles Gordon, the Hon. Read Ambler and the Hon. Eugene Premo, Appellees.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO PROPER INTERPRETATION OF 28 U.S.C. §1332.

The federal diversity statute, 28 U.S.C. §1332, is based upon the Constitution's Article III Section 2 grant of federal jurisdiction to "controversies... between citizens of different states." Neither the diversity statute nor the Constitution contain any express jurisdictional exceptions; however, a federal judicial policy of abstention has gradually evolved in cases where the federal court finds that it would usurp the traditional role of state courts in creating and modifying spousal and parent-child relationships.

In the recent *Acord v. Parsons*, 551 F.Supp. 115 (D.C. W.D. Va., 1982), for example, a district court temporarily abstained from proceeding in a tort case involving parental kidnapping, to give a state domestic relations court an opportunity to order a future custodial relationship. Since the state court's order would not affect the parent-child relationship existing at the time prior tortious acts cognizable by the federal court had been committed, the *Acord* court retained subject matter jurisdiction of the tort case, in order to proceed after there was no longer the possibility of interference with the state court's deliberations.

Acord is the most recent in a series of parental kidnapping tort cases in which courts in the Second, Fourth, Fifth, Seventh and D.C. Circuits have acknowledged the existence of diversity subject matter jurisdiction, proceeded through trial and in some cases affirmed substantial damage awards. *Kajtazi v. Kajtazi*, 488 F.Supp. 15 (D.C. E.D. N.Y. 1978), *Fenslage v. Dawkins*, 629 F.2d 1107 (5th Cir. 1980), *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982), 518 F.Supp. 720 (D.C. E.D. Wis. 1981), *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir. 1982), cert. den. ---U.S.---, Supreme Court No. 81-2152 (1982), *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982).

A judge-made federal policy of abstention relating to federal granting of marriage or divorce decrees, or of child custody status, is based in the federal district courts and courts

of appeal upon various interpretations of Supreme Court dicta in *Barber v. Barber*, 62 U.S. 582, 16 L.Ed. 226 (1859), *In re Burrus*, 136 U.S. 586, 10 S.Ct. 850 (1890) and *Ohio ex rel Popovici v. Agler*, 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489 (1930). The prevailing view among the circuits is that the Domestic Relations Abstention Doctrine is discretionary, and should be applied in specific cases where specialized state domestic relations courts would be much better suited to deal with the issues than would a federal court. Discretionary abstention implies that a federal court declines to hear a case of which the federal court has subject matter jurisdiction.

But the Ninth Circuit in the instant case, relying upon a series of prior Ninth Circuit cases in other areas peripherally involved with domestic relations status as a factual basis, has taken the extreme position that *it has absolutely no subject matter jurisdiction by virtue of a matter's "involvement"* with domestic relations. The fundamental misconception held by the Ninth Circuit has no statutory basis, and cannot logically stand concurrently with the clear acceptance of subject matter jurisdiction in the other circuit courts of appeals.

More important than a logical inconsistency, the Ninth Circuit's denial of the existence of subject matter jurisdiction is an inter-circuit conflict which may promote among parental kidnappers a pernicious new aspect of the interstate domestic-relations "forum shopping" in which such scofflaws engage: "Circuit Shopping." So long as some federal circuits remain safe havens from diversity tort liability for absconding parents, while others entertain tort actions, there may be increased flow within and between the "safe haven" federal circuits. Congress correctly assessed, in the *Parental Kidnapping Prevention Act of 1980* (PKPA)[2] that an epidemic of interstate parental kidnapping is occurring, and that state domestic relations courts of limited jurisdiction cannot effectively deal with the typical kidnapper's flight across state and sometimes international boundaries.

The federal diversity tort action against a parental kidnapper may be more effective than a state civil long-arm suit in the state from which the child was taken, or a suit in the possibly defendant-biased state to which the child has been taken. Federal judgments are more likely to be enforceable

than state judgments against the state-hopping or nation-hopping defendant. For this important federal mechanism to be effective, however, there must be consistency regarding parental kidnapping diversity cases among the federal circuits.

Establishing non-marital or non-familial duties, breach of duty, causation, damage and remedies among former spouses, according to *Cole v. Cole*, 633 F.2d 1083 (4th Cir. 1980)[3] does not require any "rule particularly marital in nature." The opinions in *Lloyd, Wasserman, Bennett and Acord,* Supra, have relied on *Cole's* viewpoint in proceeding with tort claims involving duties owed not only by un related persons, but by non-custodial ex-spouses as well. The Ninth Circuit's position, however, permits not only the ex-spouse, whose duty not to unlawfully kidnap a child, not to interfere with lawful custody, and not to inflict mental distress is unrelated to the prerogatives of state domestic relations courts, to escape

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n2. Congress' intent in Public Law 96-611, the **Parental Kidnapping Act of 1980**, 94 Stat. 3568-73, was stated as follows:
"Section 7(a) The Congress finds that-
(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation under the laws, and in the courts, of different states....;
(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given to the decisions of such disputes by the courts of other jurisdictions are often inconsistent and conflicting;
(3) those characteristics of the law and practice in such cases, along with the limits imposed by a federal system on the authority of each jurisdiction to conduct investigations and take other action outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to seizure, restraint, concealment and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and
(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians."

liability: the Ninth Circuit's policy unreasonably protects conspiring tortfeasors over whom state domestic relations courts have no jurisdiction, and over whom the state has no domestic relations interest.

To permit some circuits to exercise jurisdiction and other circuits to deny the existence of that same jurisdiction creates therefore more than a logical anomaly: it may contribute to the successful abduction of hundreds of thousands of children from state-decreed lawful custodians, and thwart one of the basic purposes of diversity jurisdiction in providing a federal forum in "controversies.... between citizens of different states." Such conflict justifies the grant of certiorari to review the judgment below.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFORTS TO INVOKE FEDERAL DIVERSITY JURISDICTION.

Nowhere is the federal judiciary's role more beneficial than matters in which one state's courts, alone, lack effectiveness. Because parental kidnapping is nearly always an interstate activity, and because state domestic relations courts have limited contempt and other enforcement powers across state lines, the victims of parental kidnappings often are obliged to seek more effective remedies. One of those remedies, a tort action, may be more effective if litigated under federal diversity jurisdiction than in state court, because of more likely execution of federal judgments. Thus, as increasing numbers of aggrieved parents seek such relief in a federal forum, it is likely that the question of subject matter jurisdiction will recur until resolved authoritatively by the highest Court. Without Supreme Court guidance, federal

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n3. "A district court may not simply avoid all diversity cases having intrafamily aspects. Rather it must consider the exact nature of the rights asserted or of the breaches alleged.... So long as diversity jurisdiction endures, federal courts cannot shirk the inconvenience of sometimes trading in wares from the foul rag-and-bone shop of the heart....the claims asserted could have arisen between strangers, and certainly between people with no marital relationship whatever." **Cole v. Cole**, Supra.

circuits will apparently continue to interpret ancient dicta independently, reaching inconsistent conclusions.

Existence of subject matter jurisdiction is an issue which may be raised at any stage in the proceedings, in trial courts or courts of appeal, because such existence is fundamental to continuance of the judicial process. Jurisdiction may not be created nor waived by the court or the parties; it either exists or it does not in a given case, independent of abstention policies or a court's desire to reduce its caseload.

Temporary abstention to the exercise of jurisdiction by a federal court may be deemed desirable, but abstention itself should be reserved for only those matters in which clear value can be shown in deferring to a state court. *See Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959)[4] .

Even before *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) mandated that federal courts be bound in diversity cases by applicable state law, federal courts had routinely determined under state law whether spousal immunity existed, or the existence of a spousal or parent-child status in a wrongful death action. Contrary to the Ninth Circuit position, federal cognizance of a settled, state-established domestic relationship has long been within the ordinary competence of federal courts. To permit the instant Ninth Circuit decision to stand may encourage an even more broadly construed carving-away of diversity subject matter jurisdiction in the Ninth and other circuits.

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n4. While the Supreme Court in **Thibodaux**, Supra, deemed a temporary abstention appropriate to allow a state court to first resolve a question of state law, Mr. Justice Brennan wrote in his dissent at 31-44:

"To order these suitors out of the federal court and into a state court....passes beyond disrespect for the diversity jurisdiction to plain disregard for this imperative duty. The doctrine of abstention, in proper perspective, is an extraordinary and narrow exception to this duty, and abdication of the obligation to decide cases can be justified under this doctrine only in exceptional circumstances where the order to the parties to repair to the state court would clearly serve one of two important countervailing interests: either the avoidance of a premature and perhaps unnecessary decision of a serious federal constitutional question, or the avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships."

This Court should finally resolve, to prevent recurring discrepancies in interpretation, whether any anomalous, non-statutory exception may be created as a matter of circuit-by-circuit judicial policy, with respect to cases factually "involving" state-fixed domestic relations status. There is a substantial need to enlighten all federal circuits as to whether the Ninth Circuit's position is valid, or whether 28 U.S.C. §1332 may be interpreted literally to grant federal courts jurisdiction concurrent with that of state courts "in *all* civil actions..." in which diversity and amount in controversy requirements are satisfied.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
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April 18, 1983

APPENDIX

FILED
Oct. 18 1982
Phillip B. Winsberry
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT A. HIRSCHFELD, individually, and WILLIAM D. HIRSCHFELD, a minor by and through his father and sole custodian, Robert A. Hirschfeld, Plaintiffs-Appellants, v. NADINE M. CLUNIE (EX-HIRSCHFELD), ROBERT K.CLUNIE, her husband, RAYMOND F. DREYER, attorney individually and as Officer of the Courts of California, The Hon. Charles GORDON, individually and as Judge of Santa Clara County, CA Superior Court, The Hon. READ AMBLER, individually and as Judge of Santa Clara County, CA Superior Court, and The Hon. EUGENE PREMO, individually and as Judge of Santa Clara County, CA Superior Court, Defendants-Appellees.	)	No. 81-5502 D.C. No. CIV 81-9 PHX CAM MEMORANDUM

Appeal from the United States District Court
For the District of Arizona
The Honorable Carl A. Muecke, Presiding
Argued and Submitted September 9, 1982
Before: HUG, FERGUSON, and CANBY, Circuit Judges.

Robert Hirschfeld and his son filed this action for damages and injunctive relief against his ex-wife, her husband, their attorney, and three California Superior Court judges for their

actions involving the custody of Hirschfeld's daughter. Diversity of citizenship was alleged as the basis for federal jurisdiction. The district court dismissed on the ground that it lacked jurisdiction under the domestic relations exception to diversity jurisdiction, and further held that the judges enjoyed immunity from the claim for damages. We affirm.

In this circuit, the federal courts must decline jurisdiction under the domestic relations exception "when the primary issue concerns the status of parent and child or husband and wife." *Csibi v. Fustos*, 670 F.2d 134, 137 (9th. Cir 1982) *quoting Buechold v. Ortiz*, 401 F.2d 371, 372 (9th. Cir. 1968). The domestic relations exception cannot be circumvented by pleading an independent tort. *Csibi*, 670 F.2d at 138.

All of Hirschfeld's diversity claims are dependent upon a determination of the proper custody of his daughter. Even his claims for child enticement and mental distress cannot be litigated independent of the custody determination. It is clear that the "primary issue" in this case concerns the status of parent and child, and this case therefore falls within the domestic relations exception to diversity jurisdiction.

To the extent that Hirschfeld has attempted to allege claims of conspiracy on the part of the state judges in violation of the federal Civil Rights Laws, his claims are based entirely on the judges' decisions in the custody dispute. The judges are immune from suit arising from their judicial activity unless they act in the clear absence of all jurisdiction. *Stump v. Sparkman*, 435 U.S. 349 (1978); *O'Neil v. City of Lake Oswego*, 642 F.2d 367 (9th Cir. 1981). Hirschfeld has alleged no facts that would deprive the state judges of their immunity here.

The judgment of the district court is AFFIRMED.

FILED
Jan. 20 1983
Phillip B. Winoberry
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT A. HIRSCHFELD, individually, and WILLIAM D. HIRSCHFELD, a minor by and through his father and sole custodian, Robert A. Hirschfeld, Plaintiffs-Appellants,	)No. 81-5502
v.	)D.C. No.
NADINE M. CLUNIE (EX-HIRSCHFELD), ROBERT K. CLUNIE, her husband, RAYMOND F. DREYER, attorney individually and as officer of the Courts of California, The Hon. CHARLES GORDON, individually and as Judge of Santa Clara County, CA Superior Court, The Hon. READ AMBLER, individually and as Judge of Santa Clara County, CA Superior Court, and The Hon. EUGENE PREMO, individually and as Judge of Santa Clara County, CA Superior Co ırt, Defendants-Appellees.	)CIV 81-9 PHX CAM)MEMORANDUM

Appeal from the United States District Court
For the District of Arizona
The Honorable Carl A. Muecke, Presiding
Argued and Submitted September 9, 1982

Before: HUG, FERGUSON, and CANBY, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED
Jun 10 1981
W.J. Furstenau, Clerk
United States District Court
For the District of Arizona

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT A. HIRSCHFELD, et.al.,	)	No. CIV 81-9
Plaintiff,	)	PHX CAM
vs.	)	
NADINE M. CLUNIE, et.al.,	)	
Defendant.	)	ORDER
	)	

Having received and considered defendants' motions to dismiss plaintiff's amended complaint and plaintiff's responses thereto, and having entered an Order on April 22, 1981, requiring the parties to submit supplemental briefs on the issue of subject matter jurisdiction, and having considered said briefs and having considered the arguments of plaintiff at oral argument on June 8, 1981, this Court finds and concludes as follows:

1. Plaintiff's claim for damages against the defendant judges is barred by the doctrines of *Stump v. Sparkman*, 98 S.Ct. 1099 (1978) and *O'Neil v. City of Lake Oswego*, ---F.2d ---, 79-4123 & 24 (9th Cir. April 20, 1981).

2. All other claims in this matter should be dismissed for the reason that this Court lacks jurisdiction over the subject matter by virtue of this matter's involvement with child support and child custody. *See* cases cited in this Court's Order of April 22, 1981. *See also, Bacon v. Bacon* 373 F.2d 316 (2nd Cir. 1967).

3. This Court specifically rejects plaintiff's contention that the Parental Kidnapping Act of 1980 confers jurisdiction on this Court under the circumstances presented in this case.

Therefore,

IT IS ORDERED that plaintiff's Complaint is dismissed, each party to bear its own costs.

DATED this 9th. day of June, 1981.

C.A. Muecke, Chief Judge

No. 82-1824

In the Supreme Court

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United States

OCTOBER TERM, 1982

ROBERT A. HIRSCHFELD, and WILLIAM HIRSCHFELD,
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VS.

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ROBERT K. CLUNIE, and NADINE M. CLUNIE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES CITED

Cases

No. 82-1824

In the Supreme Court

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OCTOBER TERM, 1982

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ROBERT K. CLUNIE, and NADINE M. CLUNIE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In a California dissolution of marriage proceeding becoming final on June 8, 1976, petitioner was awarded custody of the two minor children, Serisa, born March 19, 1964, and William, born January 8, 1966, with reasonable rights of visitation reserved to respondent Nadine M. Clunie.

Subsequently, at a hearing on April 8, 1977, the same court granted to respondent specific visitation, including alternate weekends. However, on April 18, 1977, petitioner removed the minor children to the State of Arizona, thus in effect obliterating the April 8, 1977, ruling, as formalized by the June 8, 1977, order.

On November 26, 1979, Serisa ran away from home but returned to petitioner after visiting her mother in San Jose, California. On May 30, 1980, she again ran away from her father's home, was placed by her doctor in a Protective Services Shelter in Arizona, which she left to return to her mother in California. On June 18, 1980, petitioner obtained an order in the Maricopa County Superior Court in Arizona. See Appendix A, Petitioner' Amended Complaint in this action.

On June 24, 1980, respondent Nadine Clunie obtained an ex parte order in California granting temporary custody of Serisa to her. Following a hearing in California in which petitioner himself was represented, the award was made permanent on August 18, 1980. Petitioner filed his notice of appeal from the California order objecting to California taking jurisdiction of the custody matter. The matter is still pending on appeal in Court of Appeal, First Appellate District, State of California.

Subsequently, on January 6, 1981, petitioner filed this action in the United States District Court in Phoenix, Arizona. In this diversity action Petitioner seeks injunctive relief in the nature of habeas corpus for physical return of Serisa to petitioner as well as other domestic orders (see extensive prayer for relief in complaint), plus compensatory and punitive damages.

Petitioner named as defendant his former wife, Nadine M. Clunie, her present husband, Robert K. Clunie, and her attorney, Raymond F. Dreyer, as well as three California Superior Court judges.

The District Court on June 10, 1981, in an unpublished order, dismissed the action against the three judges on the

ground of judicial immunity. The court dismissed the claims against the other defendants on the ground that the court lacked "jurisdiction over the subject matter by virtue of this matter's involvement with child support and child custody."

Petitioner appealed to the Ninth Circuit Court of Appeals. During the pendency of this appeal, on March 19, 1982, Serisa reached the age of majority.

On October 18, 1982, the Ninth Circuit Court of Appeals, in an unpublished opinion, affirmed the District Court decision dismissing the action for lack of jurisdiction under the domestic relation exception to diversity jurisdiction and holding that the State of California judges sued enjoyed immunity from the claim for damages.

Petitioner has petitioned for a Writ of Certiorari after his petition for rehearing was denied.

I

THE UNPUBLISHED DECISIONS OF THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS DO NOT CONFLICT WITH THOSE OF OTHER CIRCUITS

This court should not feel compelled to grant certiorari in this case on the grounds of conflicts in circuit court decisions. Indeed, the facts in this case, as well as the unpublished nature of the decisions, insure that no conflict exists.

The cases cited by petitioner from other circuits all have very distinct facts not present here. In each of those cases the allegations were that the minor(s) were actually kid-

napped or abducted by the defendants. In the present case a 16 year old girl voluntarily ran away from her father's home and ran to her mother's home. Even on the allegations of petitioner's complaint it is clear that no forcible abduction occurred.

Secondly, the total gravamen of petitioner's complaint concerned custody of Serisa and his attempt to force her to return to his custody. Virtually all of his twelve page amended complaint seeks a resolution of custody matters and injunctive relief. Only incidentally does he seek monetary damages, naming a huge sum, but not comparing in space or verbiage with his eight part demand for custody related injunctions.

Only now in his Petition for Certiorari does petitioner down play the injunctive relief request and insist that monetary damages were his real goal. The reason is obvious: Serisa reached the age of majority on March 19, 1982. The issue became moot.

The cases from other circuits are distinguishable.

In *Lloyd v. Loeffler,* 694 F.2d 489 (7th Cir. 1982), the court considered the case of an *abduction* since the minor child's whereabouts was not known. The action was solely for damages, not for injunctive relief and adjudication of custody. *Acord v. Parsons,* 551 F.Supp. 115 (W. D. Virginia 1982), involved a parental kidnapping. There, the federal court accepted jurisdiction in the tort action which sought only monetary damages, but stayed proceedings until the issue of custody had been determined by the West Virginia courts.

In *Kajtazi v. Kajtazi*, 488 F.Supp. 15 (E. D. N. Y. 1978), the father *abducted* the child and moved to Yugoslavia. The mother sued other persons who allegedly assisted the father for monetary damages in federal court. In that case no one raised the issue of subject matter jurisdiction. Likewise in *Fenslage v. Dawkins*, 629 F.2d 107 (5th Cir. 1980), the father aided by his relatives, *removed* the children to Canada. The court permitted a monetary recovery against relatives of the father for civil conspiracy. The issue of subject matter jurisdiction never arose; custody issues were not involved.

Wasserman v. Wasserman, 671 F.2d 832 (4th Cir. 1982), involved a *forcible removal* of three minor children by the father from one state to another and their subsequent concealment. The plaintiff was not seeking a custody determination, only damages.

In *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982), the mother of a minor child *kidnapped* him and took him out of the District of Columbia to Ohio. The Court of Appeals found no jurisdiction to grant injunctive relief, but did find jurisdiction on the monetary claims. *Bennett* cites *Wasserman* and approves the "existence of federal diversity jurisdiction in a tort suit arising out of an *alleged abduction* by one parent of a child in the custody of the other parent" (682 F.2d at 1042) (emphasis added). The court found no jurisdiction to grant injunctive relief and noted the continuing litigation in the District of Columbia.

The Ninth Circuit has denied jurisdiction when the primary issue concerns the status of parent and child or husband and wife (*Csibi v. Fustos*, 670 F.2d 134 (9th Cir.

1982) (case involved marital status of three persons in action against an estate where two women claimed to be wife of decedent); *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968) (paternity suit by German citizen in attempt to obtain child support dismissed on grounds more properly a matter for a state court)). In *Csibi* the court disapproved the attempt to circumvent the domestic relations exception by pleading an independent tort (670 F.2d at 138).

Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980), cited by petitioner, does not even involve a custody dispute. There, the charge was abuse of process, malicious prosecution and conspiracy involving an ex-spouse and others. The court determined the charges did not rest on a marital relationship; thus, the domestic relations exception did not apply and the plaintiff could sue his ex-wife for monetary damages.

In the instant case the basis of petitioner's complaint involves custody. No forcible abduction or kidnapping ever occurred or is alleged to have occurred. Petitioner acknowledges that Serisa ran away from home on more than one occasion. In this action he sought to blame others for his parental failures by seeking her forced return to his control and monetary damages from those to whom she turned in her dilemma. None of the cases cited by petitioner or decided by the various jurisdictions compel the district court to assume jurisdiction in such a case.

II

THE NINTH CIRCUIT'S DECISION WILL NOT PROMOTE FORUM SHOPPING

Petitioner charges that the Ninth Circuit's decision will promote forum shopping. However, it is submitted that an unpublished opinion has no precedent setting value. Further, based upon the distinguishing facts of this case, namely the voluntary actions of the 16 year old minor in removing herself from the custody of petitioner and going to her mother, no precedent is set for a true abduction or kidnapping case.

III

A BROAD REVIEW OF FEDERAL DIVERSITY IS NOT NECESSARY AS A RESULT OF THE NINTH CIRCUIT'S DECISION

The present case is not a proper vehicle for an extensive determination involving federal diversity issues. This case involves an unpublished decision of limited application, as discussed above. Further, the factual situation is such that the Court could easily become enmeshed in the vituperative allegations and bitterness exhibited by petitioner in his pleadings in this action. Such matters would cloud the issues and involve the court in a domestic relations wrangling.

CONCLUSION

Respondent respectfully submits that this Court should deny certiorari in this case.

Dated: July 29, 1983

Respectfully submitted,

ELEANOR M. KRAFT
Attorney for Respondent

(Appendix A follows)

Appendix A

Robert A. Hirschfeld
William D. Hirschfeld
Plaintiffs, in Propria Persona
PO Box 4842
Scottsdale, AZ 85258
[602] 998-0980

In the United States District Court
For the District of Arizona

No. CIV 81-9 PHX CAM

Robert A. Hirschfeld, individually,
-and-
William D. Hirschfeld, a minor by and through his father and sole custodian, Robert A. Hirschfeld,
Plaintiffs,
vs.
Nadine M. Clunie [Ex-Hirschfeld]
Robert K. Clunie, her husband,
Raymond F. Dreyer, attorney individually and as Officer of the Courts of California,
The Hon. Charles Gordon, individually and as Judge of Santa Clara County, CA Superior Court,
The Hon. Read Ambler, individually and as Judge of Santa Clara County, CA Superior Court,
-and-
The Hon. Eugene Premo, individually and as Judge of Santa Clara County, CA Superior Court,
Defendants.

VERIFIED AMENDED COMPLAINT
JURY TRIAL REQUIRED

1. This action arises under, this Court's jurisdiction is invoked under, and Plaintiffs bring this action to vindicate their rights under the Constitution of The United States and its First and Fourteenth Amendments; 28 USCS 1331, 1332 and 1343; 42 USCS 1983, 1985; 18 USCS 2421; 28 USCS 1738A; the laws of Arizona and California; Arizona Revised Statutes 13-1302. The amount in controversy exceeds the sum of Ten Thousand Dollars, exclusive of interests and costs.

2. Plaintiffs Robert Hirschfeld and William Hirschfeld are residents of the State of Arizona. Defendants Nadine Clunie, Robert Clunie, Raymond Dreyer, Charles Gordon, Read Ambler and Eugene Premo are residents of California. Defendants Charles Gordon, Read Ambler and Eugene Premo are Judges of the Santa Clara County Superior Court, and Raymond Dreyer as attorney is acting as an Officer of said Court, and are acting under color of the laws of California.

3. On November 22, 1975, defendant Nadine Clunie abandoned her family, including Robert Hirschfeld and the minor children Serisa and William Hirschfeld. Robert Hirschfeld sought and was awarded temporary custody of Serisa and William and obtained a divorce decree making the said Custody permanent by Order of the Santa Clara County, CA Superior Court on June 8, 1976. [Case No. 341790]

4. In early November, 1975, Robert Hirschfeld and his then-wife Nadine Hirschfeld received marriage counselling from defendant Robert Kent Clunie on the campus of DeAnza Junior College, at which he was and still is an

instructor. Robert Clunie was then duly licensed as a Marriage Counsellor by the State of California. Shortly after abandoning her family, defendant Nadine Clunie listed her address as the same as that of the home of Robert Clunie, and displayed her name on the mailbox thereof during duration of the pendency of her divorce from Robert Hirschfeld. Shortly after said divorce became final, Robert Clunie married the former Nadine Hirschfeld.

5. In January, 1977, defendant Nadine Clunie and defendant Raymond Dreyer brought an action, Santa Clara County No. 341790, against plaintiff Robert Hirschfeld to modify her visitation order from the original "reasonable rights of visitation" to one specifying inclusion of Robert Clunie, a modification which both minor children vehemently opposed. A temporary restraining order was included, pending the Order to Show Cause hearing, restraining Robert Hirschfeld from taking the minor children from California.

6. Between January, 1977 and April, 1977, defendants Nadine Clunie and Raymond Dreyer brought a series of harassing and vexatious actions against plaintiff Robert Hirschfeld related to their Visitation Modification litigation. Among other things, Raymond Dreyer personally threatened Robert Hirschfeld with "putting him in jail", and with a campaign of interference in the financial affairs of Lithic Systems, Inc., the corporation of which Robert Hirschfeld was founder and for seven years president, if Robert Hirschfeld did not assent to Raymond Dreyer's demands regarding the Visitation modification.

7. On April 8, 1977, a final determination was made at a hearing regarding the Visitation Modification, and judge-

ment having been rendered, Robert Hirschfeld was released from the temporary order restraining him from taking the minor children from California.

8. On April 18, 1977, at 12:01 A.M., Robert Hirschfeld and the minor children lawfully left California to seek employment for Robert Hirschfeld, necessitated by the financial collapse of Lithic Systems, Inc. which had occurred during the previous four months vexatious litigation brought by defendants.

9. On April 18, 1977, at 11:31 A.M. [eleven and a half hours after departure of the minor children with Robert Hirschfeld], defendants Nadine Clunie and Raymond Dreyer sought and obtained, without reasonable grounds, an ex-parte custody modification of both children to Nadine Clunie. Said Order was never served, and was quashed subsequently.

10. On June 24, 1977, defendant Nadine Clunie and plaintiff Robert Hirschfeld entered into, and obtained a judicial Order affirming, a stipulated agreement which expressly permitted Robert Hirschfeld to establish residence with the two minor children in a state other than California. Said order by the Superior Court of Santa Clara County, CA, expressly set aside the findings from the Visitation hearing of April 8, 1977, and was the last California Order entered during the three year period until June, 1980.

11. In June, 1977, plaintiff Robert Hirschfeld lawfully established residence in the State of Arizona with both minor children, and all three maintained such residence and domicile continuously thereafter.

12. In January, 1979, his financial situation having deteriorated, Robert Hirschfeld filed a URESA Uniform Reciprocal Child Support Action [Maricopa County, AZ Number DR 103605] through the Maricopa County Attorney's Office. In filing this matter, the Maricopa County Attorney's office first alleged that Robert Hirschfeld and the Minor Children Serisa and William Hirschfeld were residents and domiciles of Arizona, and subject to Arizona jurisdiction. The matter was subsequently refiled as DR 109968, and transmitted to Santa Clara County, California, where, on February 1, 1980, the Superior Court, having jurisdiction over Nadine Clunie, ordered her to pay $50 per month per child as support to Robert Hirschfeld in Arizona, said Order being based on the Court's finding that Nadine Clunie owed a duty of support to Arizona residents Robert, William and Serisa Hirschfeld.

13. Three monthly payments were made by defendant Nadine Clunie, and transmitted via the URESA system to Robert Hirschfeld in Arizona, between February and June 1980.

14. On November 26, 1979, at approximately 9:30 AM, the minor child Serisa Hirschfeld, left her residence in Arizona, and attempted to conceal herself from Robert Hirschfeld. She was last then seen at about 11:00 AM in the company of Vincent Joseph Burr, an adult with whom she had become sexually active. Serisa was at that time 15 years old. Vincent Joseph Burr transported her to a place of concealment, which she since stated was the automobile and residence of Vincent. After four days of said concealment, Vince Burr transported Serisa to the Phoenix air-

port, where he assisted her in obtaining a ticket on a Western Airline flight to San Francisco. The ticket was prepaid by defendant Nadine Clunie, who had no authority to aid in said concealment and transport. Serisa voluntarily returned from San Jose, CA to Phoenix the following Monday.

15. On May 30, 1980, at approximately 4:15 PM, the minor children Serisa and William Hirschfeld ran from their residence, and concealed themselves from Robert Hirschfeld. They were transported by an automobile belonging to Vincent Burr or one of his friends. On June 5, 1980, Serisa and Vincent Burr were observed arriving at Vincent's residence, and leaving an hour later. When telephoned by Robert Hirschfeld, Vincent Burr alleged not to know Serisa's whereabouts, but, within five minutes, Serisa telephoned Robert in response to his request to Vincent, but continued to conceal her whereabouts. While wilfully concealing Serisa from her sole custodian, Robert Hirschfeld, Vincent Burr did conspire via telephone with defendant Nadine Clunie to persuade Serisa to again travel to California, without consent of Robert Hirschfeld.

16. On June 6, 1980, family physician, Dr. Gerald Myers of Scottsdale, AZ, advised Robert Hirschfeld and the Scottsdale Police that the runaway minor Serisa was in his waiting room. While Serisa was being apprehended, a vehicle owned by Vincent Burr, AZ license RFZ201, was observed cruising repeatedly past the Doctor's office, and driving off at a high rate of speed when Police cars were sighted.

17. Serisa Hirschfeld was held by the Arizona Department of Economic Security at the "Patterdell" facility as

a runaway for the weekend of June 7-8 1980. Despite a general telephone restriction, she was erroneously permitted by Patterdell personnel to telephone Vincent Burr, at his then-listed telephone number, 946-8077. Vincent Burr maintained telephone contact with defendant Nadine Clunie, and acting as Mrs. Clunie's agent and co-conspirator, assisted Serisa on June 9, 1980, in running away from the Patterdell facility and again concealing herself. Immediately thereafter, Vincent Burr's telephone number was disconnected.

18. Between June 9th. and June 22, 1980, defendant Nadine Clunie purchased an airplane ticket, on an interstate common carrier, and caused agents in Arizona, including Vincent Burr and airline employees, to assist Serisa Hirschfeld in going to the Phoenix airport, and boarding a plane with ultimate destination San Jose, or other California Bay Area airport. Defendant Nadine Clunie did not have authority or permission of sole custodian Robert Hirschfeld for said transport, nor did Nadine Clunie have custody of Serisa Hirschfeld at the time she and her Arizona agents took, enticed, or kept Serisa from the lawful custody of Robert Hirschfeld.

19. On June 18, 1980 Plaintiff Robert Hirschfeld sought and obtained an ex-parte temporary restraining order from the Hon. Marilyn Riddell, Judge of the Maricopa County, AZ Superior Court [C414220, appended hereto as exhibit II]. Said Order restrains Vincent Burr from providing alcohol or Marijuana to the minor children Serisa and William Hirschfeld, and restrains Vincent Burr, an adult, from engaging in sexual intercourse with the minor child Serisa Hirschfeld.

20. The ex-parte restraining order was served on Vincent Burr personally on the morning of June 23, 1980. [C414220]. Later on the same day, defendants Nadine Clunie, Robert Clunie and Raymond Dreyer sought and obtained from Judge Charles Gordon, Santa Clara County, CA Superior Court, an ex-parte order granting to Nadine Clunie immediate temporary custody of Serisa Hirschfeld which would, in part, have the effect of denying to plaintiff Robert Hirschfeld standing as sole custodian in the Arizona restraining order against Vincent Burr.

21. Through her continuing sexual relationship with the adult Vincent Burr, the minor child Serisa Hirschfeld was persuaded to cooperate in an attempted custody modification to defendant Nadine Clunie, by defendants Nadine Clunie, Robert Clunie, Raymond Dreyer acting in concert with Vincent Burr and other agents in Arizona.

22. The first notification received by plaintiff Robert Hirschfeld that his daughter Serisa had been transported the second time to California without his permission was in the answer by counsel to Vincent Burr to the OSC/TRO C414220, in which it was first alleged that Robert Hirschfeld "no longer had standing" to file such a complaint on behalf of Serisa, because "she was already in the custody of her mother in California." Said answer was filed, and a copy thereof sent to Robert Hirschfeld, after the June 23rd. signing by Judge Charles Gordon of the ex-parte order, but before June 30.

23. On the morning of June 30, 1980, a hearing was held before Judge Gerber of the Maricopa County, AZ Superior Court, in which the temporary restraining order against

Vincent Burr was made permanent "or until the Plaintiff is no longer legal custodian of Serisa Hirschfeld." At the time of the hearing before Judge Gerber, plaintiff Robert Hirschfeld had not been served with any California orders relating to the attempted custody modification, and counsel for Vincent Burr in Arizona was unable to advise Robert Hirschfeld of such orders, although said counsel was in direct telephone contact with defendant Raymond Dreyer, or someone in Raymond Dreyer's office, and was acting in concert with defendants. Upon learning of the permanent order decision in Arizona, defendant Raymond Dreyer then filed the ex-parte order signed on June 23rd. by Judge Gordon, but withheld from filing until June 30th, said filing being part of a conspiracy among defendants and their Arizona agents to promote the unwholesome and unlawful sexual relationship between Vincent Burr and Serisa Hirschfeld, in exchange for Serisa's cooperation in modifying custody to Nadine Clunie.

24. At the June 30th. hearing in Arizona, counsel for Vincent Burr stated to counsel for Robert Hirschfeld that "it won't matter as soon as Mrs. Clunie takes custody away from Robert Hirschfeld."

25. The ex-parte hearing of June 23d. 1980 was held by Judge Charles Gordon without notice to plaintiff Robert Hirschfeld or opportunity to be heard. Defendants Nadine Clunie, Robert Clunie and Raymond Dreyer conspired to present to Judge Gordon an unconstitutional document supported by a sworn affidavit by Nadine Clunie which she knew, or should have known, contained lies, perjury and distortions, to wit: That Robert Hirschfeld had threatened to place Serisa in a reformatory and/or foster home and

told the child that he does not want her in his home; that the Police in Scottsdale, Arizona have on past occasions refused to release Serisa to her father; that Robert Hirschfeld had threatened Serias with physical abuse; that Dr. Gerald Myers placed Serisa in a protective services shelter rather than return her to her father. Said false and unsubstantiated accusations were accepted at face value by Judge Charles Gordon in issuing his ex-parte custody modification order, without any attempt to verify with the named Arizona Authorities or persons that defendant's sworn statements were in fact true.

26. Prior to making his ex-parte order, Judge Charles Gordon failed to ascertain, as prescribed by the UCCJA provisions of California and Arizona Law, whether a jurisdictional controversy existed, or whether Serisa Hirschfeld had lawfully entered his jurisdiction.

27. At the time Judge Gordon's original ex-parte order was issued, nearly all of the factual evidence and witnesses necessary for a determination as to whether the sworn claims made by Nadine Clunie were true, were in the State of Arizona.

28. The ex-parte order by Judge Gordon of June 23rd., filed June 30th., was not served upon Robert Hirschfeld during its pendency, and was quashed at the hearing set for showing cause, because none of the parties were present.

29. On July 14, 1980, Robert Hirschfeld "domesticated" his original California Custody Order by filing it in Maricopa County, AZ Superior Court under case number DR-132552, seeking thereby to further establish the fact of Ari-

zona residency of himself and his two minor children, which residency had begun in June, 1977.

30. At the time Serisa Hirschfeld is alleged to have been transported to California in June 1980, Robert Hirschfeld had for several years been employed in Arizona, been registered to vote and had voted, had held a valid Arizona Driver's License and other evidences of Arizona residency. The minor children Serisa and William Hirschfeld had attended public school exclusively in Arizona since 1977, and Serisa had just obtained her Arizona Driver's License, having attained the age of 16.

31. On July 15, 1980, defendants Nadine Clunie, Robert Clunie and Raymond Dreyer obtained a second ex-parte custody modification order from Judge Gordon, based on the same false claims as the first, and additionally falsely alleged acts by Robert Hirschfeld, upon which they sought and received additional ex-parte injunctive relief against Robert Hirschfeld prohibiting him from communicating freely, in exercise of his right to free speech, with defendants Nadine or Robert Clunie, or the friends or employers of Robert Clunie. Said second ex-parte order was made without due notice nor an opportunity to appear and be heard by Robert Hirschfeld, without reasonable attempt by Judge Gordon to ascertain the truthfulness of the allegations made, nor to determine if a jurisdictional dispute existed.

32. On July 22, 1980, said second ex-parte custody modification order was served on plaintiff Robert Hirschfeld.

33. On July 23, 1980, Robert Hirschfeld filed for an Order to Show Cause re Contempt in the domesticated Ari-

zona action of July 14th. After a long series of delaying tactics by defendants and their agents in Arizona, Maricopa County Superior Court Judge Elizabeth Stover found that Arizona was and is the proper jurisdiction for any custody modification re Serisa Hirschfeld, and that the California court erred in failing to follow UCCJA communication requirements with Arizona. [Exhibit III].

34. On August 1, 1980, Counsel appearing Specially for Robert Hirschfeld in Santa Clara County, CA Superior Court, filed a Motion of Inconvenient Forum, moving the California court to stay or dismiss its modification action because, among other things, nearly all of the evidence and witnesses as to the alleged acts upon which the California ex-parte modification and assumption of alleged jurisdiction were based were within the State of Arizona.

35. On August 13, 1980, Santa Clara County Superior Court Judge Read Ambler, to whom the matter had been transferred from Judge Gordon, in the absence of Counsel for Robert Hirschfeld denied the motion of Inconvenient Forum, and set a hearing on the merits of permanent custody modification for August 18th., [within 3 Court days], giving plaintiff Robert Hirschfeld no chance to prepare a defense at the 800 mile distance at which Robert Hirschfeld resided. Raymond Dreyer, defendant, alleged to Judge Ambler that he had attempted to contact counsel for Robert Hirschfeld at the last minute "by calling his office collect, and they refused to accept the call," when the toll to said counsel's office was less than a dollar; further, Raymond Dreyer attempted to rush through the Jurisdictional hearing and get out of Judge Ambler's courtroom in the few minutes it took Robert Hirschfeld's counsel, who was in

the courthouse, to determine that the matter had been reassigned to Judge Ambler, and to find Judge Ambler's courtroom.

36. On August 14, 1980, Counsel for Robert Hirschfeld entered an Appeal of the August 13th. Jurisdictional ruling of Judge Ambler.

37. On August 18th., Counsel for Robert Hirschfeld, appearing specially, attempted in Judge Ambler's chambers to advise Judge Ambler of the pendency of said appeal, and to stay the hearing on the merits, in the interests of justice. Judge Ambler refused to stay the August 18th. hearing immediately following; Raymond Dreyer informed Counsel for Robert Hirschfeld that, even though said Counsel had been retained solely for purposes of making special appearance to challenge the California court's jurisdiction that in the impending merit hearing, "if you don't represent Mr. Hirschfeld, we'll proceed without you." Thus, Counsel for Robert Hirschfeld on his own initiative, without any preparation, and without express permission from his client, made an appearance in the merits trial, and attempted through uninformed cross-examination, to somehow protect his client's battered rights.

38. In the August 18th, custody modification hearing on the merits, defendant Nadine Clunie did under oath make statements which she knew to be false, to wit: That Serisa Hirschfeld had been first transported from Arizona to California on June 24th.; that Mrs. Clunie had given up custody of Serisa originally by stipulation "because she was under threat of death from Mr. Hirschfeld," that Robert Hirschfeld had physically abused Serisa Hirschfeld; that Robert Hirschfeld had "left the state in contempt of court in April

of '77," that Serisa's desire to maintain her sexual relationship with her boyfriend, Vincent Burr, was not the reason she wanted to come to California, and distortions, misrepresentations and untruths.

39. Raymond Dreyer coached Nadine Clunie and Serisa Hirschfeld to make false statements under oath, and suborned perjury.

40. In the August 18th custody modification hearing, defendant Raymond Dreyer, attorney and thereby an officer of the court sworn to be truthful, did make statements he knew to be false, to wit: "When Serisa came to the state of California she came so under a valid California court order."

40A. Raymond Dreyer advised and counseled defendants to unlawfully remove Serisa Hirschfeld from the State of Arizona, and did institute subsequent custody actions on their behalf and in concert with them, in order to "cover up" their illegal acts.

41. Defendants continue to permit and encourage the sexual relationship between the minor child Serisa Hirschfeld and the adult Vincent Burr, whose whereabouts have since June 23, 1980 been concealed from plaintiffs by a conspiracy of defendants, and who is residing or has for a significant period since June 1980 resided in California for express purpose of continuing said sexual relationship.

42. The minor child Serisa Hirschfeld was expressly transported across the Arizona-California State Line for the purpose of furthering said unwholesome sexual relationship.

43. Defendants have conspired to interfere with the proper exercise of custody by Robert Hirschfeld of William

and Serisa Hirschfeld by clandestine encouragement, via telephone and intermediary agents in Arizona, of both teenagers to run away and to conceal themselves from Robert Hirschfeld.

44. The thus far successful retention of Serisa in California has interfered in the custodial relationship between Robert and William Hirschfeld, inducing severe behavioral and emotional problems in William by virtue of his separation from his close sibling of 14 years.

45. Serisa Hirschfeld has twice been listed as a runaway by the Scottsdale, AZ Police; on both occasions [November 1979 and June 1980] she was influenced by Vincent Burr in concert with defendants to cohabit with him and conceal herself from her father; on both occasions, she exhibited irrational and hysterical behavior symptoms, and on both occasions, defendants conspired to interfere in the responsible exercise of parental authority by Robert Hirschfeld, by transporting her to San Jose, CA.

46. Serisa Hirschfeld has been interviewed and examined by psychologists and psychiatrists in Arizona because of her self-destructive behavior; plaintiff Robert Hirschfeld was attempting to restrain Serisa from running away in June, 1980, so that she could continue to benefit from family counseling, and so that the family in Arizona including plaintiffs could benefit from Serisa's participation in such counseling, when defendants conspired to remove Serisa from a locale in which such beneficial counseling could continue, and instead conspired to reinforce and justify in the child's mind her behavior relating to sexual, drug and alcohol excesses, centered around her relationship with Vincent Burr.

47. On July 15, 1980, defendants Nadine Clunie and Raymond Dreyer filed an action separate from the custody modification [Santa Clara County number 429713, filed through the URESA office of the Santa Clara County Attorney's Office] to terminate the URESA child-support order of February 1, 1980 in regards to both Serisa and William.

48. In support of said URESA termination action, defendants knowingly asserted the false statement that William Hirschfeld no longer was in the custody of Robert Hirschfeld, when in fact no custody modification of William existed.

49. Judge Read Ambler allowed the withholding of the duty of support owed by Nadine Clunie on behalf of William Hirschfeld, and permitted month-to-month continuances of the URESA matter while allowing the child-support payments for William to be held in the bank account of Raymond Dreyer.

50. On February 10, 1980, Judge Eugene Premo held a hearing on the URESA matter, which had just been transferred to him by Judge Ambler, in which Judge Premo refused to consider petitioner's affidavit concerning petitioner's financial circumstances, stated that he assumed that petitioner [Robert Hirschfeld, plaintiff] had "the ability to support William Hirschfeld", and terminated the $50/month duty of support owed by Nadine Clunie on behalf of William Hirschfeld, and additionally ordered Robert Hirschfeld to pay $500 attorney's fees to Nadine Clunie for Raymond Dreyer's alleged fees.

51. On August 18, 1980, Judge Read Ambler granted a motion for awarding of $250 per month child support pay-

able by Robert Hirschfeld to Nadine Clunie, despite the fact that her requested petition was for only $150 per month, and neither Robert Hirschfeld nor his counsel, appearing specially, had been given advance notice of the increased amount. Said order was made solely on the testimony of Serisa Hirschfeld as to her father's alleged income, and was based on hearsay rather than knowledge.

52. Defendants conspired to transport Serisa Hirschfeld unlawfully to a distant jurisdiction [Santa Clara County, CA] where Raymond Dreyer is well known to judges, and where Family Relations Professionals, including the Conciliation Court, are professional colleagues of Robert Clunie, defendant, and therefore less likely to give unbiased testimony regarding custody of Serisa. Conciliation Court chief Warren Weiss of Santa Clara County is a personal friend of defendant Robert Clunie, and has presented lectures at the invitation of Robert Clunie in Mr. Clunie's Junior College classroom.

53. Raymond Dreyer has repeatedly and maliciously sought to place plaintiff Robert Hirschfeld in legal jeopardy because of personal animosity toward Robert Hirschfeld, and exceeded the reasonable bounds of advocacy for his clients Nadine Clunie and Robert Clunie by making defamatory remarks, both on and off the record, to Judges and other persons regarding Robert Hirschfeld, to wit: That Robert Hirschfeld was not a proper or fit custodian for the minor children; that Robert Hirschfeld had committed or threatened acts of violence which had not occurred or been threatened; that pro-se pleadings by Robert Hirschfeld or stipulated agreements in which parties were not represented by counsel should not be accorded credibility guaranteed by statute or by constitutional right.

54. Raymond Dreyer has written Orders for signature by Judges relating to Robert Hirschfeld which have exceeded in scope and intent the Orders made in open court, to wit: That the approximate time granted to Robert Hirschfeld for preparation of response regarding the motion of Respondent for Child Custody, Child Support, Attorney's Fees and Costs and Injunctive Orders during verbal discussion before Read Ambler on August 1, 1980, was stated by Raymond Dreyer in his Order Following Order to Show Cause Hearing of August 1, 1980 as "shall be heard no later than four days afterward."

55. Raymond Dreyer deliberately omitted evidence on several occasions that would be adverse to his viewpoint which would be included for completeness by any reasonable lawyer, to wit: In the jurisdictional hearing of August 13, 1980, while Counsel for Robert Hirschfeld was absent by virtue of his seeking to determine to which Judge the matter had been assigned, Raymond Dreyer professed to have "forgotten" about the Stipulated Order of June 24, 1977, with which Raymond Dreyer was fully familiar, and which Judge Read Ambler had neglected to read in the record before him, thus permitting Judge Ambler to proceed to a denial of Robert Hirschfeld's Motion of Inconvenient Forum based upon Judge Ambler's erroneous and openly stated belief that some restriction had made Robert Hirschfeld's departure from California in April 1977 illegal.

56. Raymond Dreyer has further threatened to take harassing or nuisance actions against Robert Hirschfeld to discourage Robert Hirschfeld from making personal appearance in his own behalf, to wit: Raymond Dreyer

stated to Counsel for Robert Hirschfeld on August 18, 1980, that he would take such actions "if Robert Hirschfeld ever sets foot in California." Defendants have in concert on other occasions made similar threats to Robert Hirschfeld.

57. In suborning the perjury of Nadine Clunie and Serisa Hirschfeld, Raymond Dreyer caused Serisa Hirschfeld to make false statements regarding her father and her feelings toward her father which would have the effect of demoralizing and making less effective the resolve to see Justice done by Robert Hirschfeld.

58. Robert Hirschfeld has since June 1980 been diverted and preoccupied from earning a living by litigation made necessary by defendant's actions.

59. William Hirschfeld has since June 1980 suffered deep depression and behaviorial dysfunctions requiring expensive treatment, as a consequence of defendant's actions.

60. Serisa Hirschfeld has been permitted by defendants since June 1980 to reinforce behavior based upon what she had previously learned by observing acts of her mother, Nadine Clunie, to wit: that honesty and family integrity are less important than self-gratification.

61. Defendants in concert have threatened to continue or to initiate new harassing or vexatious actions against Robert Hirschfeld in order to dissuade him from continuing to pursue remedies to the previous damaging acts of defendants, said threats including interference with Robert Hirschfeld's income and/or property in Arizona and/or in California.

62. As a proximate result of the actions of the defendants as set forth above, the plaintiffs have suffered and sustained the following injuries and damages:

(a) Deprivation without due process of law of civil rights to the care, company, companionship, society, affection and lawful custody of Serisa Hirschfeld.

(b) Pain and suffering, past and future.

(c) Loss of earnings and earning capacity past and future.

(d) Denial to Robert Hirschfeld of a legitimate duty of support by Nadine Clunie and substitution thereof of a disproportionately larger duty of support from Robert Hirschfeld to Nadine Clunie, constituting sexual bias and denial to plaintiffs of equal protection of the law.

(e) Through initiation and perpetuation of "gag orders" denial to plaintiffs of the right to free speech.

(f) The unnecessary incursion of substantial legal fees and expenses in pursuit of protection of rights, privileges and immunities denied in concert by defendants.

(g) Denial by defendants in concert of Robert Hirschfeld's right to protection of the laws of Arizona, of lawful jurisdiction and of full faith and credit thereof.

(h) Denial by defendants in concert of plaintiff's right to due notice and an opportunity to be heard.

(i) By removal unlawfully to a distant jurisdiction, creation of a psychological disadvantage for plaintiffs, and an unnecessarily high cost of legal representation.

(j) The intentional infliction of emotional distress.

(k) Denial to William Hirschfeld of a legitimate duty of support from Nadine Clunie in violation of his right to equal protection of the law.

(l) Long-term emotional and behavioral damage to William Hirschfeld, and damage to Robert Hirschfeld in that Robert Hirschfeld must as custodian deal with the continued stress created by such damage to William.

(m) Restraint, by threat, of the civil right to travel in interstate commerce.

WHEREFORE, plaintiffs pray judgment as follows:

COMPENSATORY DAMAGES OF $1,500,000 and PUNITIVE DAMAGES of $1,500,000, Jointly and Severally from defendants to plaintiffs.

ATTORNEY'S FEES AND COSTS, and reasonable compensation for the litigant's time when litigating In Propria Persona.

INJUNCTIVE RELIEF as follows:

(a) That all defendants be enjoined from concealing, restraining or aiding in the concealment or restraint of Serisa Hirschfeld, and that said defendants shall cause the minor child Serisa Hirschfeld to be delivered to Robert Hirschfeld or his designee within Arizona, for purposes of family counseling, psychological evaluation and reconciliation with plaintiffs.

(b) That defendants be enjoined from violating or conspiring to violate the terms of the Arizona restraining order against Vincent Burr (C414220).

(c) That defendants be enjoined from enforcement or collection of any Santa Clara judgement rendered since

June 1980 for child support or attorney's fees in favor of defendants, or relating to custody of Serisa or William Hirschfeld.

(d) That defendants be enjoined from initiating or prosecuting retaliatory nuisance actions against plaintiffs, including but not limited to threats, molesting of plaintiffs, their friends or relatives, actions against plaintiff's property or interference with plaintiff's income or earnings, or interference with plaintiff's rights, privileges and immunities.

(e) That defendants be ordered to reinstate and continue paying to Robert Hirschfeld the URESA Child Support originally awarded him on February 1, 1980, and to forthwith pay withheld portions thereof to Robert Hirschfeld in Arizona.

(f) That defendants be enjoined from granting consent for marriage to Serisa Hirschfeld, from any emancipation or adoption proceedings before Serisa attains the age of 18, without consent of her father, Robert Hirschfeld.

(g) That defendants be enjoined from interference with Robert Hirschfeld's lawful custody of William Hirschfeld.

(h) That defendants be enjoined from interfering with plaintiff's right of free speech and of plaintiff's right to travel in interstate commerce.

Plaintiffs further request the court's consent to amendment of this Complaint upon revelation by discovery or otherwise of further acts committed by defendants or of other co-conspirators thus far concealed from or unknown to plaintiffs.

Dated this 2nd. day of March, 1981.

/s/ Robert A. Hirschfeld
Robert A. Hirschfeld, Plaintiff
in Persona Propria, individually
and by and for the minor child
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No. 82-1824

In The

Supreme Court of The United States

October Term, 1982

ROBERT A. HIRSCHFELD, and
WILLIAM D. HIRSCHFELD,
Petitioners,
v.
RAYMOND F. DREYER,
ROBERT K. CLUNIE, and
NADINE M. CLUNIE,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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September 9, 1983

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CORRECTIONS TO RESPONDENT'S STATEMENT OF THE CASE

The Question Presented on Certiorari is a matter of Law. Nevertheless, Respondent's factual misrepresentations should not stand uncorrected.

The April 8, 1977 California visitation order was not "obliterated" by the brief vacation lawfully enjoyed by Petitioner and his two children in his custody; rather, it was expressly voided by a stipulated agreement in early June,

1977, said stipulation becoming order of the California court on June 24, 1977.

Respondents mischaracterize Serisa's June 9, 1980 *escape* from Arizona authorities, and Respondent's thwarting of the renewed police search for the child by Respondent's admitted removal of Serisa from Arizona to California as "...she left to return to her mother in California."

Respondents gloss over the crucial events between Serisa's June 9, 1980 escape from the Arizona facility, and Respondent's seeking of an exculpatory custody modification on June 24, 1980 in California. These events, which are alleged specifically among the other allegations of the Amended Complaint (Respondent's Opposition Appendix A), independently comprise the solid jurisdictional foundation for the federal diversity tort action herein:

☐ *Petitioner Robert Hirschfeld had settled, uncontested sole custody of Serisa at all times until the June 24, 1980 ex parte order.*

☐ *Respondents wilfully took, enticed or kept Serisa from her father's care, custody and control, by transporting Serisa from Arizona to California, without Petitioner's knowledge or consent, and concealing her whereabouts before they obtained the June 24, 1980 ex parte order.*

☐ *All persons, including non-custodial ex-spouses, have a common-law duty not to engage in such custodial interference, which additionally, is a felony,* A.R.S. §13-1302, *in Arizona.*

☐ *Volition or active participation of the child is not a defense in either custodial interference tort or felony action. The victim is deemed to be the parent who is unlawfully deprived of the child.*

☐ *Diversity subject-matter jurisdiction of the federal court attached by virtue of the tort commission between June 9 and 24, 1980, and does not abate merely because Respondents thereafter sought to embroil the California state court in a self-serving, exculpatory domestic relations custody modification.*

Serisa's attainment of her majority on March 19, 1982 did indeed render injunctive relief moot. In their 23 page Opposition Appendix, Respondents are apparently attempting

to unduly impress the Court with the percentage of Amended Complaint verbiage necessarily devoted to setting forth the factual background of the complaint, and praying for now-moot injunctive relief. The prayer for $3,000,000 in compensatory and exemplary damages at Law can hardly be termed insubstantial. Petitioner's Ninth Circuit oral argument on September 9, 1982, focused solely upon said monetary damages. Respondent's Opposition allegation that such focus arose only on Petition for Certiorari is false.

1.
THE *DE FACTO* DOMESTIC RELATIONS POLICY OF THE NINTH CIRCUIT CREATES INTERCIRCUIT CONFLICT WHETHER PUBLISHED OR NOT

The *de facto* Ninth Circuit domestic relations policy is published in *Csibi v. Fustos*, 670 F.2d 134 (9th Cir. 1982) and *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968), neither of which deal with the torts of parental kidnapping, custodial interference, or intentional infliction of severe emotional distress.

The policy's application to the instant case is known by word of mouth among judges and lawyers, and is cited in the American Bar Association book, Hoff, Schulman, Volenik and O'Daniel, *Interstate Child Custody Disputes and Parental Kidnapping: Policy, Practice and Law*, Lib.Cong.Cat. Card No. 82-83415, ISBN 0-89707-084-4 at page 3-44. The instant Petition for Certiorari, including the gravamen of the Ninth Circuit's policy, is nationally reported at 9 FLR 2547 and 51 LW 3296. Existence and gravamen of the then-pending Ninth Circuit appeal herein was disclosed and discussed from the podium at the September 9-11, 1982 *First National Conference on Interstate Child Custody and Parental Kidnapping Cases*, Washington, D.C., sponsored by the Child Custody Project and Family Law Section, American Bar Association.

Word-of-mouth knowledge of the instant case has caused at least one other federal diversity parental kidnapping tort complaint, originally filed in the Arizona District Court, to be witheld from service while it is refiled in a District Court within the Fifth Circuit, whose published *Fenslage v. Dawkins*, 629

F.2d 107 (5th Cir. 1980) indicates probable acceptance of subject matter jurisdiction there.

Each Appellate Judge of the Ninth Circuit was given an opportunity, by Petitioner's Suggestion of Rehearing in Banc, to request a vote regarding rehearing of the instant case. All declined (Appendix, A3, to Petition for Certiorari), indicating a tacit Circuit-wide knowledge and approval of the *de facto* policy.

The dangers and pitfalls of judicial suppression of opinion publication are treated in Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975); Reynolds and Richman, *The Non-Precedential Precedent- Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L.Rev. 1167 (1978); Note: *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L.Rev. 128 (1977).

The Ninth Circuit's *sub silentio* policy is unfair to future litigants, undoubtedly encouraged by successful published federal diversity parental kidnapping tort actions in other Circuits, who may file doomed complaints within the Ninth Circuit. Non-publication thus may fail of its essential purpose, judicial economy, by engendering many wasteful, aborted federal court actions in the Ninth Circuit.

Precedential conflicts of the Ninth Circuit's published *Csibi* and *Buechold*, Supra, cases were not presented to the Supreme Court for resolution. It is not the instant case's precedential value but its timeliness and clear statement of the *de facto* conflict which recommends Certiorari to enable the Supreme Court to address an issue no less real by virtue of non-publication. The Court should not permit a Circuit to knowingly perpetuate such a conflict by the Circuit's refusal to publish cases wherein the conflict might become more evident.

2.
RESPONDENT'S ALLEGED FACTUAL DISTINCTIONS ARE IRRELEVANT TO THE INTERCIRCUIT CONFLICT

Respondents, for the first time attempt in their Opposition to characterize the cited cases with which the Ninth Circuit conflicts, as involving "forcible removals or abductions,"

conjuring up visions of unwilling children being dragged away, kicking and screaming, by one of their own parents. Of course, this is rarely the case.

Children whose unified family has been split by divorce almost universally regard their transportation or retention by a non-custodial parent, with or without consent of the lawful custodian, as at least a temporary "visitation." The common law of torts and the various state criminal sanctions for such unilateral "removals or abductions" focus upon damage done to the victimized lawful custodian, regardless of the child's volition or cooperation in the tortious or criminal act.[1,2]

Respondents have presented no foundation for their allegation that the children in the cited *Lloyd, Acord, Kajtazi, Fenslage, Wasserman* or *Bennett* cases were more or less cooperative with the unlawfully "abducting or removing" non-custodial parent than was Petitioner's daughter herein. Indeed, in *Lloyd* and *Kajtazi*, the role played by the child may never be known, as the children in those cases remain missing.

The cited cases share not only a striking factual similarity with the instant matter, more importantly, they share a common legal issue: in each, a federal court was faced with a decision as to whether exercise of federal diversity jurisdiction

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n.1. "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has left him, is subject to liability to the parent." **Restatement II of Torts,** 33 §700, **Causing Minor Child to Leave or Not to Return Home.**

n.2. A.R.S. §13-1302, **Arizona Revised Statutes: Custodial Interference; classification-**

A. A person commits custodial interference if, knowing or having reason to know that he has no legal right to do so, such person knowingly takes, entices or keeps from lawful custody any child less than eighteen years of age or incompetent, entrusted by authority of law to the custody of another person or institution.

B. Custodial interference is a class 6 felony unless the person taken from lawful custody is returned voluntarily by the defendant without physical injury prior to arrest, in which case it is a class 1 misdemeanor.

might interfere with the state's historic pre-emption in *establishing or modifying familial relationships.*

Outside the Ninth Circuit, modern federal court decisions have held that federal jurisdiction could be exercised over tortious breach of duties *which were not unique to spousal or parent-child relationships*, and narrowly construed the exclusive domain of state courts to lie in *creation or modification* of such relationships.

The conflicting Ninth Circuit view overbroadly proscribes mere *federal reliance* upon the *res judicata* of a long-settled, state created or state modified family relationship, as an underlying status requisite at the time a tortious act is committed. It is this question of Law, not fact, which forms the Question Presented on Certiorari.

3.
MOOTNESS OF ONE POTENTIAL REMEDY DOES NOT PRECLUDE STILL-VIABLE RELIEF

The Federal Rules of Civil Procedure permit complaints to be pled in the alternative. F.R.C.P. 8(a) Petitioner originally sought both injunctive and monetary relief. Now that the injunctive prayers have become moot through Serisa Hirschfeld's attainment of majority, Respondents appear to argue that the still viable prayer for substantial tort damages does not merit further consideration. To the contrary: troublesome issues involved solely with the injunctive relief need no longer cloud a clear consideration of the inter-circuit conflict revolving around the damage claims.

Respectfully submitted,
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